STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	Case No. SA-CE-1184-S PERB Decision No. 1435-S May 11, 2001

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for International Union of Operating Engineers; State of California (Department of Personnel Administration) by Gail T. Onodera, Labor Relations Counsel, for State of California (Department of Corrections).

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the State of California (Department of Corrections) (State) from an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the State unlawfully retaliated against Steven Plesha, a job steward with the International Union of Operating Engineers (IUOE), because he engaged in protected conduct, in violation of the Ralph C. Dills Act (Dills Act) section 3519(a) and (b).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all stautory references are to the Government Code. Section 3519 states, in pertinent part:

It shall be unlawful for the state to do any of the following:

The Board has reviewed the entire record in this case, including the unfair practice charge, the briefs of the parties, the ALJ's proposed decision, the State's statement of exceptions and IUOE's opposition. The State's request for oral argument on the exceptions is hereby denied. The record and briefs clearly present both the issues and the positions of the parties.[2] The Board finds the proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to the Ralph C. Dills Act (Dills Act), Government Code section 3514.5(c), it is hereby ordered that the State of California (Department of Corrections) (State) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Remove the letter of reprimand from the personnel file of Steven Plesha (Plesha) and destroy all references thereto.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]The Board finds that the exceptions filed by counsel for the State are insulting, demeaning and deprecating to the ALJ. Such ad hominem attacks go beyond the bounds of

2. Offer Plesha the next available chief engineer position in northern California.

3. Reimburse Plesha for losses, monetary and otherwise, incurred as a result of the State's unlawful conduct, at the interest rate of 7 percent per annum.

4. Within ten (10) workdays following service of a final decision in this matter, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

5. Notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, of the steps the State has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the International Union of Operating Engineers.

Member Baker joined in this Decision.

Member Amador's concurrence begins on page 4.

---

advocacy and border on misconduct. (Business and Professions Code section 6068(b).) The Board admonishes counsel against filing similar pleadings with PERB in the future.

AMADOR, Member, concurring: I concur in the result of the majority's decision, but I would omit footnote 2. Without commenting on the content of the exceptions filed by the State of California (Department of Corrections) (State), I simply do not think it is appropriate for the Board to exercise this degree of involvement in a matter that has nothing to do with the substantive legal issues before it on appeal.

First, the Board should refrain from doing anything which may create the perception that it is sheltering its administrative law judges (ALJs) from even the rudest and most unprofessional pleadings filed by a party. When the party accused of inappropriate language or tone happens to be the party that does not prevail, if the Board chastises that party for conduct unrelated to the merits of the case, it could create the appearance that there is a linkage between the outcome of the case and the unrelated conduct.

Second, our ALJs do not need this type of "protection" from the Board. They are professional jurists who are experienced at handling a highly charged courtroom atmosphere, and they understand the difference between advocacy and insult. It is not the place of the Board to make such a judgment.

It has been my observation that truly offensive, written personal attacks on ALJs rarely occur. The vase majority of parties appearing before the Board understand that they are likely to be more effective advocated if they refrain from making personal attacks on those who decide their cases.

For these reasons, I would not publicly admonish the State's counsel in a footnote to a published decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-1184-S, International Union of Operating Engineers v. State of California (Department of Corrections), in which all parties had the right to participate, it has been found that the State of California (Department of Corrections) (State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Remove the letter of reprimand from the personnel file of Steven Plesha (Plesha) and destroy all references thereto.

2. Offer Plesha the next available chief engineer position in northern California.

3. Reimburse Plesha for losses, monetary and otherwise, incurred as a result of the State's unlawful conduct, at the interest rate of 7 percent per annum.

Dated: _____ STATE OF CALIFORNIA
(DEPARTMENT OF CORRECTIONS)

By:_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	Unfair Practice Case No. SA-CE-1184-S PROPOSED DECISION (10/8/99)

Appearances: Van Bourg, Weinberg, Roger and Rosenfeld by Matthew Gauger, Attorney, for International Union of Operating Engineers; Gail Onodera, Labor Relations Counsel, for State of California (Department of Corrections).

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The International Union of Operating Engineers (IUOE or Union) commenced this action on October 20, 1998, by filing an unfair practice charge against the State of California (Department of Corrections) (State or CDC). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on February 9, 1999.

The complaint alleges that the CDC retaliated against Steven Plesha (Plesha), an IUOE job steward, because he engaged in protected conduct. Specifically, the complaint alleges, Plesha informed his supervisor that he would seek legal assistance through the Union if what he viewed as an unwarranted investigation of an alleged breach of tool control procedures interfered with his promotion. At the time, Plesha had been offered a promotion to a supervisory position at another facility

and he was concerned that an investigation would jeopardize it. The CDC pursued an investigation and the offer of promotion was withdrawn as a result. Eventually, Plesha received a letter of reprimand for, among other things, not following tool control procedures and for threatening his supervisor. The alleged threat for which Plesha was disciplined varied from the statement attributed to him in the complaint. In the letter of reprimand, Plesha was accused of threatening to report health and safety violations at the facility to the newspapers if his promotion was blocked. As part of the latter allegation, Plesha was accused of attempting to blackmail his supervisor. Later, the letter of reprimand was overturned by the State Personnel Board (SPB). The State's conduct, the complaint concludes, violated the Ralph C. Dills Act (Dills Act) section 3519(a) and (b).[1]

---

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code. In relevant part, section 3519 states:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The State answered the complaint on March 11, 1999, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a PERB agent, but the dispute was not resolved. The undersigned conducted a formal hearing in Sacramento on May 5-6, 1999. With receipt of the final brief on August 23, 1999, the case was submitted for decision.

JURISDICTION

IUOE is the exclusive representative of an appropriate unit of employees (Unit 13) within the meaning of section 3513(b). The State and the CDC are employers within the meaning of section 3513(j). Included in Unit 13 are stationary engineers.

The most recent collective bargaining agreement between the State and the IUOE expired on June 30, 1995. As of the date of hearing, the parties had not reached agreement on a successor contract.

FINDINGS OF FACT

In April 1997, Plesha, Dale Cates (Cates), Richard Morte (Morte), and Welgim Wise (Wise) were stationary engineers at California State Prison, Solano (Solano). Their immediate supervisor was Manuel Merino (Merino), the chief engineer.

The key events in this case begin with a security audit at Solano on April 24, 1997.[2] During such an audit, generally

[2]Unless otherwise noted, all dates refer to 1997.

speaking, a team of inspectors searches the facility to determine if any security risks exist. This particular audit was to take place in the wake of an escape at a neighboring correctional facility where the escapee used a CDC tool, so security was a sensitive topic at the time.

At approximately 12:30 p.m. on April 24, Merino entered the shop, announced there would be a security audit the next day, and ordered the engineers to prepare. He testified that he told the engineers to clean up the shop and store any "hot trash" in the water treatment plant outside the fenced perimeter.[3] Merino also directed the engineers to remove specific items, such as garden hoses and rubber belts. However, he did not mention tools specifically.

Merino's order was described in more detail by the engineers. They said Merino was not known for handling the stress of the chief engineer's position well. When Merino gave the order, Plesha testified, "he was very excited and unsure of what needed to be done, but he ordered us to clean the shop and get everything out that pertained to any items that shouldn't be in there, that wouldn't match our inventories, that would be scrutinized by the security team as being things that, you know, need to be taken out of the institution." According to Plesha, Merino said "get all this shit out of here, because you know how

[3]Hot trash includes items such as metal instruments, sharp fiberglass, rods, and other objects that can be used as weapons.

these fuckers try to burn people here, they try to find things on them."

Morte testified that Merino was "literally foaming at the mouth" and "ready to go off the deep end." At some point in the discussion, Morte testified he called in Greg Brock (Brock), the plant manager and Merino's immediate supervisor, for guidance. Brock deferred to Merino as the supervisor in charge and said the engineers should follow his directive. At that point, according to Morte, Merino said to "get everything the fuck out of here and we'll deal with it later."

Cates testified that Merino was agitated when he ordered the engineers to clear "stuff for the electrified fence, escape paraphernalia, rubber stuff, excess inventory." Wise did not testify at the hearing.

After giving the order, Merino left the shop. Pursuant to his directive, the engineers' shop was to be cleared by the end of the work day, 3:30 p.m.

In the process of clearing the shop, the engineers discovered approximately 50 uninventoried tools in a locker. Because Merino was not present and the shop had to be cleared by the end of the work day, the engineers decided to move the tools to the water treatment plant, where Merino earlier had ordered the hot trash to be taken. By the end of the day, the tools had been transported to the plant and secured in a locker with Cates's padlock. Morte testified that "we thought the best thing to do is get [the tools] out of the security area" and "as soon

as Manny [Merino] was at a point to where he was able to be talked to, not as upset as he was that day, we were going to talk to him and explain to him that we found these tools."

Although Merino testified that no one tried to contact him about the tool discovery, all three engineers testified to the contrary. Plesha testified that attempts were made to contact Merino on April 24, 25 and 28. Merino could not be found on the afternoon of Thursday, April 24. He was in Sacramento for a substantial part of the day on Friday, April 25. And he was generally unavailable on Monday, April 28. Plesha further testified that attempts were made to page Merino, but they were unsuccessful. On direct examination, Cates testified that he did not attempt to contact Merino after taking the tools to the water treatment plant, but on cross examination he conceded that he tried to contact Merino on April 25 without success. And Morte testified that the engineers tried to contact Merino on April 24 or 25.

Based on the foregoing, I credit the testimony of the engineers. All three testified in a more convincing manner than did Merino, and Cates and Morte have no stake in this proceeding. Thus, I find that the engineers tried to contact Merino but he was unavailable.

Meanwhile, on April 25 Merino was in the water treatment plant and discovered the tools and other materials.[4] As a

[4]Pornographic materials were also discovered with the tools. It was later determined that the materials belonged to Cates.

supervisor, Merino had a master key to all employee locks and he was able to open Cates's lock with no difficulty. Merino immediately contacted Joseph Ruiz (Ruiz), supervisor of building trades, who had primary responsibility for tool control. Neither Merino nor Ruiz contacted any of the stationary engineers, even though they felt the engineers had stored the tools in the water treatment plant. Instead, they concluded it was inappropriate for the tools to be in that location and were obligated to follow the chain of command in reporting the incident to Brock. At Brock's direction, the tools were transported to the plant manager's office and secured in a locker there.

According to Brock, Merino and Ruiz assumed the tools were being "staged;" that is, employees had hidden them outside the perimeter with the intent of stealing them later.[5] Brock further testified that he contacted his supervisor, Associate Warden Kathleen Dickinson (Dickinson), who directed him to contact the Investigative Services Unit (ISU). On April 28, officers from ISU became involved. They prepared a report and photographed the items found at the water treatment plant.

Each department at Solano uses a color and an inscription to identify its tools. Some of the tools found in the water treatment plant were identified by the appropriate color and

[5]IUOE business representative Bob Tofanelli (Tofanelli) questioned this assumption. Based on his nine year experience as an IUOE representative, he testified that if CDC representatives truly believed the tools were being staged for theft, they would have placed a surveillance team at the water treatment plant until such time as the employees attempted to remove the tools.

inscription, but many had neither. Among the tools were two portable, battery-run power saws: a circular saw and a reciprocating saw. The inscription and color code had been sanded off the circular saw. There is no evidence about who sanded off the markings.

The saws had been ordered by Plesha in January and received by Ruiz at the warehouse on March 7. The saws were color-coded and inscribed at that time and placed on an inventory in Ruiz's office. Asked if he recalled handing out the saws, Ruiz testified: "I believe I gave them to Mr. Plesha, and at the time, as usual, asked him to put it on his -- to give me an updated inventory by the end of the day."

It is not disputed that, as of April 24, Plesha had not inventoried the saws. However, he disputes Ruiz's testimony about how the saws were delivered to the shop. Plesha testified that the saws were placed in the shop and some time prior to April 24 they were discovered under other boxes.[6] Plesha testified that he simply did not complete the inventory because the atmosphere in the shop was "hectic" and "the boss would come in each day and rant and rave on cleaning the shop" to pass the security audit. Plesha said this caused "mass confusion" for "a couple of weeks." Delay in inventorying the saws was not unusual. In the past, Plesha testified, engineers had been given a reasonable amount of "flex time" to inventory new tools if they

[6] As more fully discussed below, I find that the State has not established that Ruiz delivered the saws directly to Plesha in the engineers' shop.

were busy with other tasks, as was the situation in April 1997. Plesha testified that this was "condoned" and "allowed" by CDC management.

As a general rule, moreover, tool inventory procedures at Solano were "pretty lax," according to Plesha. Merino and Brock testified along similar lines that the tool inventory program at Solano "wasn't exactly 100 percent," although progress toward improvement was being made.

In fact, Ruiz testified that he felt it was his (Ruiz) job to follow-up and make sure the saws were inventoried, though no formal procedure required him to do so. In an April 30 memo to Brock, Ruiz wrote: "I did not follow through making sure that these tools were in fact put on the inventory, it did not seem to be a necessity in the past. I will rewrite the procedures to incorporate a system to ensure compliance." Nonetheless, Ruiz and Associate Warden Dennis Sisto (Sisto) testified that breach of tool control procedures is a serious matter that is cause for adverse action.

Turning the April 24 incident over to ISU was "out of the ordinary," Plesha testified. Merino corroborated Plesha's testimony on this point. Asked what would have happened if the engineers had succeeded in contacting him, Merino said he would have reported the incident to Brock, but "we'd probably take the tools and put them in as excess tools and had them sent out to

RASP [recycling and salvage plant] and try to work the situation out."[7]

As noted, the engineers were unsuccessful in their attempts to contact Merino, and Merino never contacted them about either the outcome of the security audit or the discovery of tools at the water treatment plant. The engineers became concerned because Cates learned late on April 25 that Merino had discovered the tools, but he had not contacted them.

On April 29, Plesha asked Brock to meet with the engineers to discuss the tool incident and other matters. The discussion that occurred during the meeting plays a pivotal role in the instant case. The State contends that disciplinary action was justified because Plesha's comments at the meeting were unlawful threats or blackmail and that he was dishonest when questioned about the comments during the subsequent investigation.[8]

---

[7]Tofanelli generally corroborated the testimony given by Plesha and Merino on this point. He said a "float" of uninventoried tools at Solano was a matter of concern for engineers. Although the general practice was to address tool inventory or missing tool issues with a letter of instruction or a counselling memo, individual supervisors at Solano had varying approaches to such issues based on their personal relationship with the engineer involved. As a result, Tofanelli said, some employees received a mere warning for minor tool policy infractions, while others received punitive action.

[8]The precise allegation of dishonesty in the disciplinary letter issued to Plesha is as follows: "you demonstrated discourteous behavior when you attempted to threaten Greg Brock with blackmail when you made a statement to the effect of 'Management had better not jeopardize my chances to promote to Chief Engineer at Corcoran II or I'll go to the newspapers with information regarding wasteful dumping by custodial staff at the [RASP], along with numerous other environmental violations."

According to Plesha, he explained to Brock that Merino, on April 24, asked the engineers to clear the shop in preparation for the security audit. Tools and other materials were discovered in the process, and they were moved to the water treatment plant. Brock responded, "oh, that's what's going on," Plesha testified. Plesha and Morte testified that Brock also said the matter had been turned over to ISU and it was out of his hands, but "all we should receive is a letter of instruction over it, that it was no big deal." Plesha further complained that Brock turned the matter over to ISU without first contacting the engineers and said he didn't have much faith in the institution conducting an unbiased investigation. According to Plesha and Morte, Plesha then said "if my promotion is lost over this clouded and obscure issue, that I will have no alternative but to seek legal counsel with the union."[9] Plesha recalled that Brock got "sharp" and said "do what you have to do."

Plesha raised other topics during the meeting. He cited concerns the engineers had with Merino's handling of the security audit and other similar matters. He mentioned an incident where tools were found in the hazardous materials locker. He brought up a recent incident where freon, a refrigerant, was discharged into the atmosphere at Solano while refrigerators were being moved in an improper manner. This was a violation of U.S.

[9]On April 12, Plesha had accepted an offer to become the chief engineer at the California Substance Abuse Treatment Facility and State Prison at Corcoran (Corcoran). He was to begin the new job on July 1.

Environmental Protection Agency (EPA) regulations governing refrigerant handling practices. Plesha had contacted EPA and wrote a letter to that agency. Also, he told Brock at the April 29 meeting that there "appears to be a cover-up" concerning the refrigerant incident and he was "taking it to the union." Later, Plesha pursued the issue with EPA and an investigation followed.

Plesha testified that he could not recall making a statement about contacting the newspapers or the media with complaints about CDC management. However, the transcript of an investigative interview on September 22 states Plesha told investigators that he said to Brock, "maybe the public should know how business is conducted in CDC." The transcript of the interview further states that Plesha then told Brock "if my promotion is lost over this clouded and obscure issue, I will have no alternative but to pursue this mater and seek legal counsel as necessary."[10]

In his testimony, Brock agreed that Plesha asked why the employees were not given the opportunity to present an explanation before the matter was turned over to ISU. According to Brock, he explained that no one had taken responsibility for

[10]At another point in the investigative interview, the transcript shows that Plesha denied making a reference to the media during the April 29 meeting. The State has argued that this comment is evidence that Plesha was dishonest. However, the question asked of Plesha was in connection with his threat to take legal action. Asked in that context if he made "any reference" to the media, Plesha responded "No. I did not mention anything then."

the tools, so he notified his supervisor and an investigation was being planned. Having talked to Merino, Brock testified, he was of the opinion that Merino had directed the engineers to remove only hot trash from the shop.

Brock also agreed that Plesha was concerned an investigation would jeopardize his promotion to chief engineer. Brock testified: "[Plesha] expressed that if this did, I guess, prevent him from his promotion, he would go to the newspapers or something to that effect." "[T]he insinuation was that we were dirty and that he would go to the newspapers," Brock further testified. Brock said the threat was made in reference to the improper relocation of refrigerators.

In response to a question by CDC counsel, Morte testified: "I remember we were talking about the whole incident, what was going on with vocation, about everything that was thrown out, the way things were dealt with the EPA, and I remember Steve saying something to the effect that I'm surprised nobody has gone to the media with this. I don't recall -- it was, like I told you last week, I don't recall if it was the exact words was media or newspaper, but everybody keeps saying media and that's kind of what stuck in my mind." Later in his testimony, Morte was asked if Plesha made a statement that related to his promotion. Morte responded: "[Plesha] asked [Brock] is this going to affect anything, and basically one of the things Greg Brock told us, the worst you're going to get is a letter of instruction, you know, it's not that big a deal. And it was, I remember Steve

mentioning, you know, if this really interferes with it, I'll get legal counsel or get a lawyer."

Cates was not present for the entire meeting on April 29. However, while present he heard Plesha say "something about maybe the media needs to come in here and expose what was going on, and I didn't know what was being referenced". He then left the meeting. Cates later testified that Plesha also made a comment about a "lost opportunity". Asked if this comment came before or after his comment about "the papers," Cates said he could not remember.

It is difficult to determine precisely what was said at the April 29 meeting. However, based on the totality of the testimony outlined above, I find that Plesha informed Brock that he would seek legal counsel or Union counsel if the tool incident interfered with his promotion. Plesha and Morte testified persuasively that Plesha made these or similar statements, and neither Brock or Cates rebutted their testimony on this point. Further, Plesha may have said words to the effect that the public should know how business is conducted at Solano or that he might go to the newspapers to report various complaints of unlawful practices, such as that which led to the discharge of a refrigerant in violation of EPA regulations. But this is not the same as the threat attributed to Plesha in the letter of reprimand. The assertion that Plesha threatened public exposure of health and safety violations at Solano <u>if</u> his promotion was blocked simply is not supported in the record. No engineer who

attended the April 29 meeting testified that Plesha uttered the alleged threat attributed to him in the letter of reprimand. Even Brock's testimony on this point is equivocal. He testified that Plesha said if the April 24 incident prevented his promotion he would go to the newspapers "or something to that effect."[11]

Based on the foregoing, it is concluded that the answers given by Plesha during the September 22 investigative interview were consistent with the discussion at the April 29 meeting.

As of April 29, Brock was aware that Plesha was a job steward, had complained about the refrigerator incident, and had been "hard on his supervisors for lots of incidents." He said he based this perception of Plesha on "supervisory referrals," but not on his "union representation." According to Ruiz, Plesha had the reputation of being a "difficult employee" who was "a little difficult to supervise" because "he would argue about how [a job] should be done."

With respect to job performance, Plesha had the reputation as a good employee. Ruiz testified that Plesha's reputation was

---

[11]Testimony given at the SPB hearing tends to corroborate this finding. At that hearing, Plesha denied threatening Brock with going to the newspapers to retaliate or even mentioning the media. He admitted saying only that he would seek legal counsel through the Union if his promotion was denied. Morte testified that "the one thing I remember was [Plesha] said if they mess up my transfer, I'm getting an attorney. And the reason I remember that is because that's what was in my mind, because at the time I was going for a transfer, too, to Folsom." On direct examination at the SPB hearing, Brock testified that Plesha said he would go to the newspaper if the tool incident was "elevated." However, asked on cross-examination if Plesha may have said he would seek outside legal counsel if his promotion was denied, Brock responded "well, he may have." Cates was subpoenaed to testify at the SPB hearing, but he did not appear.

one of "honesty" and he was a "very capable" engineer. Brock even appointed him acting chief engineer at Solano in May and again in June, while Plesha was under investigation for attempted theft and blackmail.

On May 7, Brock sent Dickinson his version of the events surrounding the tool incident and the April 29 meeting. Among other things, Brock informed Dickinson that the engineers' explained they transported the tools to the water treatment plant because Merino was under stress and could not deal with the tool overage, but nonetheless it was inappropriate to place the tools at the water treatment plant without prior approval. Brock did not mention the scope of the directive given by Merino to the engineers on April 24, nor did he mention the atmosphere in which Merino gave the directive. Brock also informed Dickinson that Plesha, at the April 29 meeting, said CDC management "had better not jeopardize his chances to promote" to the chief engineer position at Corcoran, and that Plesha had "threatened to 'go to the newspapers' with information regarding wasteful dumping by custodial staff at the [RASP] along with the 'numerous other' environmental violations." In reference to these comments, Brock wrote in the memo, "I [will] not be threatened." In connection with the EPA incident, Brock's memo noted that Plesha had presented him with a document defining the fines and penalties associated with the release of freon to the environment.

On May 22, Dickinson formally requested that Warden A.C. Newland (Newland) initiate an "administrative inquiry" into the

alleged "theft of State property." The request was accompanied by reports from Brock, Merino, and Ruiz.

Also in May, Mark Marton (Marton), an ISU captain at Solano, submitted a request for investigation of the engineers to Newland. Among the stated reasons for the request to investigate Plesha was the assertion that he "informed the Correctional Plant Supervisor he would go to the 'newspapers' with information about wasteful dumping and numerous other environmental violations if this incident jeopardized his chance to promote to Corcoran State Prison." Like the information provided to Dickinson, Marton's request stated that the tools were taken to the water treatment plant because the engineers felt Merino was under stress and could not deal with the tool overage rationally. There was no mention of the directive given by Merino to the engineers on April 24. The request concluded with the allegation that Plesha "attempted to steal 'a locker full of unidentified tools' and tried to blackmail his supervisor into not reporting the incident, once the supervisor became aware of the attempted theft of tools." Marton's request was based solely on information provided by the supervisors involved; he contacted none of the engineers before requesting an investigation. On June 23, Sisto, acting for Newland, approved requests to investigate the incident.

Meanwhile, Plesha's promotion to chief engineer at Corcoran remained in effect. In June, he spent his vacation visiting Corcoran and looking for housing there. He had been invited by

Corcoran staff to tour the facility and meet his new coworkers. On June 26, while at Corcoran, Plesha received a telephone call from Marton. Marton informed Plesha that he was under investigation for stealing tools and threatening his supervisor, and that officials at Corcoran would be notified of the investigation.[12] According to Plesha, Marton informed him that the investigation would be on the "fast track" and it would take between two to six months. Plesha said he was "quite disturbed." He told Marton that an investigation would destroy his promotion even if he was vindicated of the charges. Marton agreed.

The next day, June 27, Corcoran Warden J.W. Fairman (Fairman) withdrew the offer of promotion. As the basis for withdrawal, Fairman said he had "recently become aware of substantial new information" about Plesha.

Earlier, on May 23, Plesha was removed from the promotional list for the chief engineer classification. The reason for removal was his appointment to the chief engineer position at Corcoran. The list expired in early June. Plesha had been scheduled to interview for placement on the new list on June 10. However, he did not attend that interview because he had accepted the position at Corcoran. Thus, by the end of June, Plesha had no position at Corcoran and he was not on the new promotional list for the chief engineer classification.

---

[12]The Department Operations Manual (DOM), section 33010, provides: "incidents affecting the employee's performance occurring between the time of transfer approval and the transfer date shall immediately be brought to the attention of the receiving hiring authority."

Sheri Lozano (Lozano), employee relations officer at Solano, testified that Plesha could have requested reinstatement to the list by contacting the certification office at CDC headquarters. However, by the time Plesha learned officially that he was under investigation, the list he had been on was no longer in existence.

Plesha remained at Solano and the investigation proceeded. On September 22, he was interviewed by Marton and ISU lieutenant M.L. Pappa (Pappa). Eventually, Plesha was disciplined, in part, for the answers he gave to the investigators about how the saws entered the engineers' shop.

As noted earlier, Ruiz testified in this proceeding and at the SPB hearing that he gave Plesha the saws shortly after they arrived and asked him to inventory them. On the other hand, Plesha testified in this proceeding and at the SPB hearing that Ruiz did not deliver the saws to him personally. Plesha has maintained from the beginning that he discovered them in the shop under other materials sometime prior to April 24. At about that time, according to Plesha, he concluded that the circular saw would not be of much use in the engineers' shop, so he offered it to Mike Brewer (Brewer), a carpenter, for use in the carpenter shop.

Plesha was charged with dishonesty for telling investigators on September 22 that the saws were merely left in the shop by Ruiz. He was also charged with dishonesty for attempting to

shift responsibility for a saw to another employee by claiming he offered it to Brewer for use in the carpenter shop.[13]

To establish its allegation that Plesha was dishonest at the September 22 interview regarding how he received the saws, the State has the initial burden of showing that Ruiz, in fact, personally delivered the saws to Plesha. The State has not met its burden. Both Ruiz and Plesha were credible witnesses who testified forthrightly. I have carefully considered their testimony and there is no reason in this record to discredit either witness on this point. It is possible that Plesha gave a dishonest answer in an effort to cover up his failure to inventory the saws. However, it is equally possible that Ruiz, who was responsible for tool control, was less than truthful in an attempt to cover up the fact that he left two hot tools in the shop. The State simply has failed to carry its burden of showing that Ruiz, in fact, personally delivered the saws to Plesha in the engineer's shop. Therefore, it cannot be concluded on this

---

[13]During the interview, Marton asked Plesha how he received the saws. Plesha responded: "A . . . these tools . . I believe when they came in the shop there were just . . . a . . . left in a cardboard box and left in the Engineers' Shop and they were unaccounted for. I'm not sure how long . . . you know . . . they were even left there, but this is typical . . . 'cause at times . . . you know . . . when tools have come in [Ruiz] would leave 'em in his office in a cardboard box for long periods of time." At another point in the same sequence of questions, Marton asked if he noticed the saws prior to April 24. Plesha responded: "I don't recall. I think there were . . . a . . . like I say . . . you know . . . left in . . . you know . . . with the other boxes and stuff, 'cause we have a lot of stuff that's . . . you know . . . well, moved around and . . . you know . . . pieces of equipment that are layin' out." Prompted by another question, Plesha recalled that he had seen the saws prior to April 24 and talked to Brewer about them at that time.

record that Plesha was dishonest about how he received the saws.

Similarly, to establish its allegation that Plesha was dishonest at the September 22 interview regarding his discussion with Brewer, the State first must show that Plesha had no discussion with him. Brewer was called as a witness by the State in the instant proceeding. Counsel for the State asked Brewer if Plesha discussed with him in early 1997 whether he could use a circular saw in the carpenter shop. Brewer responded: "I think I stated in my last testimony [before the SPB] that might have been a possibility, but I didn't really recall whether he had or not, but it's possible." Based on Brewer's equivocal testimony, I find that the State simply has not met its burden of showing that Plesha was dishonest about the discussion with Brewer.

On April 20, 1998, Plesha received a letter of reprimand accusing him of violating the Government Code, section 19572, in several respects.[14] In brief, the factual allegations were that Plesha failed to inform his supervisor of the discovery of unmarked tools in the engineers' shop and assisted other engineers in transporting the tools to the water treatment plant in an attempt to conceal their discovery from supervisory staff. It was alleged that the "cover-up" could have led to the theft of state tools. It was also alleged that Plesha failed to inventory the saws delivered to him, and was dishonest when he stated in the September 22 interview that the saws were left in the shop

[14]The letter is considered a disciplinary action that is appealable to the SPB.

and that he offered one of the saws to Brewer. Finally, it was alleged that Plesha, on April 29, "attempted to threaten Greg Brock with blackmail" and was dishonest when he denied making the threat during the September 22 interview.

On December 20, Cates transferred to the Department of Forestry and Fire Protection (DFFP). As of the time of his transfer, he was under investigation for his role in the tool incident. Solano did not contact DFFP about the investigation and did nothing to interfere with his transfer. A February 20, 1998, a letter of instruction (LOI) addressed to Cates for his role in the April 24 tool incident was introduced into evidence; however, Cates testified that he never received a LOI personally.[15] The LOI stated that Cates failed to notify his supervisor of the discovery of unmarked tools on April 24 and failed to inventory the tools before transporting them to the water treatment plant.[16]

The investigation of Morte was completed on February 20, 1998. On April 6, 1998, a LOI was issued to him for his participation in the April 24 tool incident. The LOI accused Morte of assisting in transporting tools to the water treatment plant without authorization. On November 5, 1998, Morte

[15]Unlike a letter of reprimand, a LOI is not considered discipline and may not be appealed to the SPB. Lozano testified that a LOI is not considered adverse action and would not hold up a transfer.

[16]The LOI also accused Cates of failing to report the discovery of pornographic material on April 24.

transferred to Folsom State Prison (Folsom). CDC did nothing to impede his transfer.

In or about March 1998, Wise retired from state service. Prior to his retirement, on February 20, 1998, a LOI was issued to Wise, but apparently he never received it. The basis of the LOI was the same as the LOI given to Cates, except there was no mention of pornographic material.

According to Brock, Dickinson told him that Plesha received a more severe penalty than the other engineers because of his threat to go to the newspapers.

Lozano testified that it is not CDC policy to report pending investigations or adverse actions to other agencies when employees are in the process of transferring, unless the receiving agency asks for such information. Pursuant to DOM section 33010, Lozano and Sisto testified, it is the policy to report pending investigations or adverse actions to other facilities within CDC when affected employees are in the process of transferring to those locations. In addition, Lozano testified that neither a LOI nor an adverse action would automatically block a transfer to another institution within CDC because the decision to accept a transfer is within the discretion of the receiving institution.

Plesha appealed his letter of reprimand to the SPB. The SPB administrative law judge (ALJ) found that the engineers were exonerated of any charges that they conspired to steal state tools. However, the CDC decided that Morte, Cates, and Wise

should receive LOIs for their failure to comply with tool control policies, while Plesha was given a letter of reprimand. The SPB ALJ found that the more severe penalty was based on Plesha's alleged threat to go to the newspapers with safety violations and his dishonest response during the September 22 investigatory interview about the alleged threat. The ALJ found that these charges were not supported by a preponderance of the evidence.[17] The ALJ concluded that Plesha should have received a LOI and ordered his letter of reprimand revoked. On March 9, 1999, the SPB itself denied CDC's petition for rehearing and the ALJ's decision became final. As of the date of the hearing in this matter, the CDC had not appealed the SPB's decision.

ISSUE

Was Plesha investigated and issued a letter of reprimand in retaliation for his protected conduct?

CONCLUSIONS OF LAW

In order to prevail on a charge of retaliation, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the

[17] In reaching this conclusion, the ALJ discredited the testimony of Brock regarding the alleged threat "because of the intense animosity he displayed toward [Plesha] during the hearing, which culminated in an emotional outburst during his testimony which necessitated a recess to restore order;" the other witness who purportedly heard the threat did not testify at the hearing; and statements at the investigatory interview were "equivocal at best." The ALJ found the charge that Plesha was dishonest during the investigatory interview was not established by a preponderance of the evidence because the State failed to submit a transcript of the interview or any other evidence of what transpired at the interview.

employer took adverse action against an employee because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, a variety of circumstances may justify an inference of unlawful motivation on the part of the employer. (See e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, p. 15.)

Once an unlawful motive is established, the burden of proof shifts to the employer to establish that it would have taken the action complained of even in the absence of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626] (Martori).) In this case, the State's action should not be deemed an unfair practice unless the Board determines that "but for" his protected conduct Plesha would not have been placed under investigation and issued a letter of reprimand. (Ibid.)

As IUOE argues, all elements needed under Novato to establish a prima facie case have been shown. Plesha was an active job steward during the period leading up to and including the tool incident. On April 29, he called a meeting with Brock on behalf of himself and other employees to discuss the incident,

problems the engineers were having with Merino, discovery of tools in the hazardous materials locker, and the discharge of freon in violation of EPA regulations. During the meeting he said he would contact the Union for legal assistance if the tool incident investigation blocked his promotion to the chief engineer job at Corcoran. He also made comments to the effect that the public should know how business is conducted at Solano and that he might go to the newspapers with information about health and safety concerns, such as the discharge of a refrigerant in violation of EPA regulations. Acting in a representative capacity as a job steward in employment related matters such as those discussed on April 29 is protected conduct. (See Los Angeles Unified School District (1992) PERB Decision No. 957.)

In addition, Plesha suffered an adverse action. (See Palo Verde Unified School District (1988) PERB Decision No. 689.) He was investigated and received a letter of reprimand. As a direct result of the investigation that led to discipline, Plesha lost a promotion to chief engineer at Corcoran.

There is direct evidence that unlawful animus played a role in the decision to investigate Plesha and the adverse action that followed. The letter expressly states that the discipline was based on comments made at the April 29 meeting regarding the so-called threat to go to the newspapers. Even Brock testified that he was told by Dickinson that Plesha received a more severe penalty because of the alleged threat about going to the

newspapers with complaints about health and safety and other environmental matters. As more fully addressed below, I find Plesha's comment in this regard protected. An investigation and adverse action based on a protected act has a chilling effect on employee rights and is direct evidence of unlawful motive.

There also is circumstantial evidence of unlawful motive. The way Solano handled the tool incident was a departure from past practice. Without minimizing the importance of tool control at a correctional institution, it cannot be overlooked that the tool control procedure at Solano was not strictly enforced. Plesha testified that the procedure was "pretty lax" and Brock conceded that it "wasn't exactly 100 percent." The fact that, as of April 24, almost 50 unaccounted for tools were found in the engineers' shop validates the testimony of Brock and Plesha in this regard.

In this context, Plesha credibly testified that turning over this particular incident to ISU without even minimal input from the engineers was "out of the ordinary." Even Merino testified that if the engineers had contacted him on April 24, 25, or 28, he would have reported the matter to Brock, but the tools probably would have been sent to the recycling and salvage plant (RASP) and he would have tried to "work the situation out." Departure from established practice is evidence from which an unlawful motive may be inferred. (See Novato at p. 7; Woodland Joint Unified School District (1987) PERB Decision No. 628.)

Even assuming that contacting ISU and/or Dickinson upon discovering the tools on April 25 was justified, by April 29 the basis for their continued involvement was all but eliminated. On April 29, the engineers voluntarily explained the entire incident to Brock after efforts to contact Merino were unsuccessful. They admitted transporting the tools to the water treatment plant under somewhat unusual circumstances that were known to Brock by that time. As Morte testified, Brock was consulted for advice on April 24 about Merino's directive and he deferred to Merino. By the end of the meeting on April 29, it was known that the engineers acted in accord with Merino's sweeping directive and that Plesha had ordered the saws and failed to put them on the inventory. In fact, Brock informed the engineers on April 29 that the incident was not a serious matter and would likely be addressed with LOIs. It seems there was little left to investigate, except for an alleged threat that turned out to be protected conduct. Thus, the evidence points to the conclusion that Brock's decision to pursue the matter after April 29 indicates he was more interested in an investigation of Plesha's alleged attempt to intimidate him than he was in addressing the reasons the tools were moved to the water treatment plant in the first place. This too suggests an unlawful motive. (See Baldwin Park Unified School District (1982) PERB Decision No. 221, pp. 16-17.)

In assessing Brock's motivation, it is noteworthy that he was aware that a formal investigation would jeopardize Plesha's

promotion, yet he took no steps to avoid that eventuality and resolve the matter informally or at least without formal discipline. Such an approach would have been consistent with past practice. Instead, Brock presented Dickinson with an incomplete picture of events. In a May 7 memo, Brock informed her the tools had been wrongly moved to the water treatment plant, but he provided no indication that the engineers had acted pursuant to a broad, or at least ambiguous, order from Merino. The memo also included distorted accusations that Plesha attempted to blackmail him and an assertion that he would not permit Plesha to threaten him. Relying on information from the supervisors, Marton also requested authority to investigate Plesha on similar information. His request also included an unsubstantiated accusation that Plesha was suspected of attempting to steal a locker full of tools.

And it appears that neither ISU, Brock, or Dickinson took steps to expedite the matter, even though they knew Plesha's promotion was at stake. Despite assertions during testimony that he was concerned Plesha's promotion might be jeopardized, Brock did not submit his version of events to Dickinson until May 7. Dickinson waited until May 22 to request an administrative inquiry from the warden, Marton recommended an investigation sometime in May, and the warden did not authorize the investigation until June 23, about one week before Plesha was to begin employment at Corcoran. This strikes me as a remarkably slow pace to investigate an employee who allegedly is suspected

of stealing tools, especially when the facts surrounding the incident are largely undisputed.

By late June, however, the die was cast. Although as a general rule a receiving facility may have the discretion to accept an employee under investigation, it was virtually certain that Corcoran, upon learning that Plesha was under investigation, would summarily reject him. That is precisely what happened.

Further evidence of unlawful motive is found in the pretextual nature of the charges against Plesha. The SPB overturned the letter of reprimand issued to Plesha. As more fully discussed below, I too find the reasons for issuing Plesha a letter of reprimand do not withstand scrutiny. They are pretextual and thus suggest an unlawful motive. (See San Leandro Unified School District (1983) PERB Decision No. 288.)

Finally, I recognize that the investigation involved three engineers in addition to Plesha and it is not alleged that they engaged in protected activity. However, this factor, standing alone, does not outweigh other evidence of unlawful motivation directed at Plesha. As the Board has recognized, it is unlawful to discriminate against an entire group of employees based on unlawful intent toward a union activist in the group. (See Cupertino Union Elementary School District (1986) PERB Decision No. 572; see also San Diego Community College District (1983) PERB Decision No. 368.)

Based on the foregoing, it is concluded that IUOE has stated a prima facie case of retaliation. The State, however, contests this conclusion.

The State contends that Plesha's supervisors, Merino and Brock, had no input into the adverse action. The State points out that it was Dickinson, not Brock, who referred the matter to ISU for investigation and the final decision to discipline Plesha was made by the warden. Accordingly, the State concludes, although Merino and Brock had knowledge of Plesha's union activities, there is no evidence to impute their knowledge to the warden.

The evidence, however, does not support the State's argument. As more fully addressed below, even assuming as true the State's version of the April 29 meeting, the letter of reprimand itself cites a protected act as a key reason for the discipline. In fact, as Brock testified, Plesha's threat was the sole reason that he received a more severe penalty than the other three engineers. Clearly, the so-called threat, characterized during the investigation as blackmail, was known to every management official up the chain of command to the warden.

I find, moreover, that the alleged threat and other evidence of unlawful motive outlined above tainted the investigation from the outset and ultimately influenced the decision to issue the letter of reprimand. Even if contacting ISU was justified upon discovering the tools in the water treatment plant on April 25, by the end of the meeting on April 29 it was clear that concerns

about theft and security were greatly exaggerated and a formal investigation would jeopardize Plesha's promotion. Yet nothing was done to halt the looming investigation. In fact, Brock presented a limited version of events to Dickinson and Marton, and he alone advanced the accusation that Plesha threatened or attempted to blackmail him. He was joined by Ruiz and Merino in the accusation that tools had been inappropriately transported to the water treatment plant, despite the fact that every engineer explained that they acted in accord with Merino's instruction. At the same time, it is worth mentioning all supervisors were aware of Plesha's activities as a IUOE steward and his complaint about the health and safety violations stemming from the freon discharge incident. And at least Brock and Ruiz had formed the perception that Plesha was somewhat of a difficult employee.

Taken together, these factors point to the conclusion that the investigation and the discipline itself were tainted by unlawful motive. Unlawful animus may be imputed to high management officials where, even innocently, they rely on inaccurate and biased information of lower level management officials. (See e.g., State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S, p. 16.)

The State next argues an employee's comment to the effect that he will go to the newspapers if his promotion is withdrawn is unprotected individual activity. The State contends "an employee's activity is concerted when the activity is engaged in with, or on behalf of, or on the authority of other employees,

and not solely by and on behalf of the employee himself" (citing NLRB v. Mini-Togs (5th Cir. 1993) 980 F.2d 1027 [142 LRRM 2265, 2270] and Reef Industries, Inc. v. NLRB (5th Cir. 1991) 952 F.2d 830 [139 LRRM 2435]), or where the employee asserts a right under a collective bargaining agreement (citing Prill v. NLRB (D.C. Cir. 1987) 835 F.2d 1481 [127 LRRM 2415, 2418]). In the State's view, Plesha's statement that he would go to the newspapers with health and safety complaints if his promotion was held up is unprotected because he has no contractual right to a promotion, his promotion is of interest only to himself, and there is no evidence that he obtained prior authorization from other engineers to discuss the promotion with Brock. Therefore, the State concludes, the statement attributed to Plesha in the letter of reprimand is unprotected. This argument is without merit.

Section 3515 provides that "state employees shall have the right to represent themselves individually in their employment relations with the state." Interpreting similar language in the Educational Employment Relations Act (EERA),[18] section 3543, PERB has held that individual complaints about employment matters are protected as part of an employee's right to self representation. (See e.g., Pleasant Valley School District (1988) PERB Decision No. 708, pp. 13-15 (Pleasant Valley) [individual complaint that mower unsafe to drive found protected].) Thus, even if Plesha was acting as an individual at the meeting on April 29, his conduct would not be unprotected for that reason alone.

[18]EERA is codified at section 3540 et seq.

In further arguing that Plesha's conduct was not protected, the State concedes he sought to pursue lawful objectives, including protecting his promotion and going to the newspapers with information regarding environmental violations. However, the State argues in its brief, Plesha "sought to do it in an unlawful manner by making one dependent on the other, i.e., if his promotion did not go through, he would go to the newspapers with information that allegedly would reflect badly on his employer." This type of "threat or proposition is blackmail or extortion," the State concludes, and is "obviously criminal and unlawful." I find this argument lacks merit legally and factually.

As a factual matter, evidence that Plesha linked protection of his promotion with a threat to go to the newspapers is lacking. As indicated in the findings of fact, Plesha may have insinuated that Solano is "dirty" and said words to the effect that maybe the public should know about it. But the evidence does not support the conclusion that Plesha threatened Solano with public exposure for assorted environmental infractions if his promotion was lost. As concluded in the findings of facts, what Plesha did say on April 29 is that he would seek Union counsel or legal counsel if his promotion was lost as a result of the tool incident. Both Plesha and Morte persuasively testified on this point, and their testimony was not rebutted by either Brock or Cates. Surely, such a comment is protected.

Even assuming Plesha made the comment attributed to him in the letter of reprimand, it would be protected. In Community Hospital of Roanoke Valley (1975) 220 NLRB 217 [90 LRRM 1440] (Community Hospital), a nurse's statement on a television broadcast protesting wages and staffing at the hospital at which she was employed was found to be protected. As with Plesha, the nurse's statements related to employment conditions, and there was no merit to the claim that she was disloyal or her comments were untrue. The National Labor Relations Board (NLRB) found that employees have the right to appeal for public support in their efforts to improve employment conditions.[19] (Community Hospital at p. 223, enforced Community Hospital of Roanoke v. NLRB (1976) 538 F.2d 607 [92 LRRM 3158].) It follows that a threat to go to the newspapers with information about health and safety violations at Solano similarly is protected, and such a comment would not lose its protection merely because it is made in an attempt to preserve a promotion that Plesha had competed for and won. (See also Interstate Security Services, Inc. (1982) 263 NLRB 6 [110 LRRM 1535] [protected conduct found even where expression of labor dispute to newspaper coincidentally reveals

[19] Although the language of the Dills Act is not identical to that of the National Labor Relations Act (NLRA), the Board looks to the NLRB's construction of the NLRA for guidance in interpreting the various statutes it administers. (See e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, pp. 18-19, fn. 8; citing McPherson v. PERB (1987) 189 Cal.App.3d 293, 311 [234 Cal.Rptr. 428]; Modesto City Schools (1983) PERB Decision No. 291, pp. 61-62.)

information employer would understandably prefer to keep out of the public eye].)

Nor was any comment uttered by Plesha out of line under PERB case law governing speech in the workplace. In determining whether speech is protected under PERB-administered statutes, the Board follows a well established line of cases. In Rio Hondo Community College District (1980) PERB Decision No. 128, at pp. 18-20, the Board found that an employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. To decide whether employer speech is lawful, a principal consideration is whether the speech contains a "threat of reprisal or force" (Id. at p. 20.), under an objective rather that a subjective standard. (California State University (California State Employees Association, SEIU Local 1000) (1989) PERB Decision No. 777-H, adopting proposed decision of administrative law judge at 12 PERC Para. 19063, pp. 292-294.) Thus, it must be shown that the challenged "communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact that employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H, pp. 15-16, fn. 9.) In addition, statements are viewed in their overall context to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No.

659.) Protected speech may lose its statutory protection only where it is found to be so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption or material interference" with operations. (Rancho Santiago Community College District (1986) PERB Decision No. 602, p. 13.)

While most PERB case law in this area has involved employer speech, the same standards apply to speech of employee organization representatives as well. (See South Bay Union School District (1990) PERB Decision No. 815, p. 12.) And an employee's right to engage in protected conduct permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. (Rio Hondo Community College District (1982) PERB Decision No. 260.) The foregoing standards have been applied to free speech cases under the Dills Act. (See State of California (Department of Transportation) (1996) PERB Decision No. 1176-S, adopting dismissal of regional attorney at 21 PERC Para. 28016, p. 39.)

The context in which the April 29 meeting took place is significant. This was not an isolated one-on-one meeting between a union steward and a supervisor over an issue unrelated to employment conditions. Plesha called the meeting with Brock on behalf of himself and other engineers to discuss the tool issue and related problems with Merino. Plesha participated in the meeting as a job steward and he acted as the chief spokesperson. Although Plesha's promotion was one topic of discussion, also

discussed were the discovery of tools in the hazardous materials locker and the violation of EPA regulations. Plesha noted that he might take the latter issue to the Union. Almost the entire discussion was conducted by Plesha on behalf of himself and other employees about employment related matters. In sum, the meeting was the kind of situation where a job steward should be free to engage in open discussions about employment matters. This is precisely what Plesha did.

Moreover, the record does not support a finding that Plesha acted in an insulting or insubordinate manner. While the discussion may have been a contentious one, Plesha never crossed the line into conduct that would render his speech unprotected. Nor does the evidence suggest that Brock was overly upset as a result of the meeting. Although Plesha testified that Brock got "sharp" at one point, the meeting ended with Brock simply telling Plesha to "do what you have to do." Under an objective standard, it cannot be concluded that a reasonable person would feel threatened by the discussion that took place on April 29.

Finally, there is no evidence that Plesha's comments led to disruption or interfered with operations in any way. In fact, not long after the meeting Brock appointed Plesha acting chief engineer at Solano.

Based on the foregoing, it is concluded that Plesha's comments at the April 29 meeting were protected by the Dills Act.

In a lengthy argument the State next points to a long line of First Amendment cases in defense of its action. That argument, as I understand it, is summarized as follows.

Recognizing that public employees do not relinquish their First Amendment right to comment on matters of public interest by virtue of government employment, the State argues that the government has a greater interest in regulating the speech of its employees by virtue of its role as employer. (Citing Connick v. Myers (1983) 461 U.S. 138, 140 [103 S.Ct 1684].) In resolving First Amendment issues, the State continues, courts are required to balance the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service. (Citing Pickering v. Board of Education (1968) 391 U.S. 563, 568 [88 S.Ct. 1731] (Pickering).) In applying the balancing test, the State also points out, an employer may not discipline an employee for his or her speech unless the employer believes the speech is disruptive or does not involve a matter of public concern; and the public employer need not conduct a full-scale investigation into the speech, but must have some reasonable basis for its action. (Citing Waters v. Churchill (1994) 511 U.S. 661 [114 S.Ct. 1878] (Waters).)

According to the State, even if it is found that Plesha did not make the precise statement charged in the notice of adverse action, at a minimum, his comment was reasonably susceptible to the interpretation given it by Brock. To support this argument,

the State contends IUOE counsel admitted at hearing that Plesha, on April 29, told Brock, "if you take my job away, I'm going to turn you in for the EPA violations." Plesha's comment not only was "individual and illegal," the State asserts, the admission is evidence under Waters that the State had a reasonable basis for taking action. Considered in the totality of this record, this argument is not convincing.

First, the comment made by Union counsel, as presented by the State, is incomplete and out of context. When counsel's full comment is read in context, it cannot be viewed as an admission. The comment was made during cross-examination of Marton in the context of Union counsel asking Marton what he knew about Plesha's conduct as of the time he investigated Plesha. The complete comment is "Oh, okay. But, you did have knowledge that Mr. Plesha said, look, if you take my job away, I'm going to turn you in for the EPA violations, you had knowledge of that?"

I do not read the question as an admission. Rather, it is an attempt to determine what Marton's understanding of Plesha's conduct was at the time of the investigation. And this was relevant because what Marton knew was told to him by Brock.

The evidence shows that Plesha, on April 29, said he would seek Union counsel if his promotion is denied and in a separate statement he said, in essence, that he was surprised nobody had gone to the media or that maybe he would go to the media with information about practices at Solano. Under the First Amendment

cases cited by the State, that comment is not a reasonable basis for discipline.

As IUOE points out, speech about public disclosure of the release of chemicals into the atmosphere in a correctional facility is a matter of public concern. The various federal and state environmental protection acts reflect legislative and public concern over the condition of the environment, including public entities. Indeed, EPA followed up with an investigation. Plesha definitely had an interest, as a citizen as well as an employee and job steward appointed to monitor employment conditions at Solano, in speaking out on employment matters and violations of EPA regulations. (See Chico Police Officers' Association v. City of Chico (1991) 232 Cal.App.3d 635, 646-647 [283 Cal.Rptr. 610].)

There is no question that CDC has an interest in promoting the efficiency of the public service it performs. However, that interest must be balanced against that of the employee in speaking out on matters of public concern. To determine if the State's interest has been impaired under the Pickering balancing test, the State lists several factors it deems relevant. These are whether an employee's speech was made at an appropriate time and place and in an appropriate manner; whether proper employer-employee relations can be maintained as a result of the speech; whether the employee is involved in a direct working relationship with a person affected by the speech; the effect of the speech on efficiency and harmony; the need for loyalty and confidentiality;

and the effect of the speech on discipline. (Citing California Department of Corrections v. State Personnel Board (1997) 59 Cal.App.4th 131, 148 [69 Cal.Rptr.2d 34].) Even using the criteria proffered by the State, it is concluded that the State's interest was not impaired here.

The comments at issue here were made in a meeting with a supervisor and other employees called by Plesha in his capacity as a job steward, conduct protected by the Dills Act. Although the comments were made in the context of a sometimes contentious discussion, they reflect the kind of discussion that routinely takes place in the labor-management relations setting. There is absolutely no evidence that they had a lingering negative effect on the individual participants, or on overall employer-employee relations. As the evidence indicates, the ensuing investigation took place with Plesha's and IUOE's involvement in an atmosphere of mutual cooperation. Nor is there evidence that Plesha's comments had an effect on efficiency, harmony, loyalty, or confidentiality. In fact, shortly after the April 29 meeting Brock appointed Plesha as acting chief engineer at Solano. And there is no evidence that Plesha's actions affected discipline. The disciplinary and corrective actions taken as a result of the April 24 tool incident, although misguided, were carried out without incident and there has been no inappropriate conduct as a result of the discussion at the April 29 meeting.

In sum, when the Pickering balancing test is applied to the totality of this record, the balance weighs in favor of Plesha

and his right to make comments such as those made at the April 29 meeting.

The alleged threat aside, the State cites several reasons to support its claim of just cause to discipline Plesha.[20] The State argues that Plesha failed to place the saws on the inventory list and moved them outside the security perimeter in an attempt to conceal the tools from supervisory staff; Plesha was dishonest during the investigation when he told investigators he discovered the saws in the shop a few days before April 24; and Plesha was dishonest during the investigation when he told investigators that he spoke to Brewer about giving one saw to the carpenters' shop because it was not suitable for use in the engineers' shop.

It is beyond question, as Ruiz and Sisto testified, that tool control procedures are important to security in a correctional facility. And breach of such procedures may be cause for discipline. However, beyond these general assertions,

---

[20]In connection with this position, the State argues that it would be inappropriate to give collateral estoppel effect to the SPB decision and that decision should be given little or no weight in this proceeding. According to the State, the SPB did not address the issue of retaliation and in any event the hearing was a "circus." IUOE does not argue for collateral estoppel effect. Instead, IUOE argues that PERB should give "comity" to the SPB decision. (Citing Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 200 [172 Cal.Rptr. 487].) IUOE contends that the question whether the State had cause to discipline Plesha was litigated before the SPB and the undersigned should at least give comity to the SPB decision on that issue. Although I have considered the SPB record, I have not given the SPB decision collateral estoppel or comity. I have made independent findings on the issues under PERB jurisdiction which are before me. Therefore, it is unnecessary to address the arguments raised by the parties on these points.

it is useful to examine the actual practice at Solano in determining whether just cause existed to discipline Plesha.

It is true that Plesha had responsibility for inventorying the saws and he did not do so by April 24. However, his failure in this regard was not inconsistent with the practice at Solano. Plesha credibly testified that the tool inventory practice was a flexible one which was openly condoned by management at the facility. Engineers were given a reasonable amount of time to do so, especially when they were in a busy period. Brock and Merino also testified that the tool control policy "wasn't exactly 100 percent." In fact, there are concrete examples to support the conclusion that the requirement to inventory tools was loosely enforced. Of the 50 tools found at the water treatment plant, almost all of them had not been inventoried. There was another incident where tools were found in the hazardous materials box. And the record in the SPB hearing corroborates evidence in this proceeding that the tool inventory policy at Solano was not strictly enforced.

Further, Plesha testified that turning the April 24 incident over to ISU was "out of the ordinary." Merino corroborated Plesha in this regard. He testified that the April 24 tool incident was not the kind of incident that would result in an investigation and discipline. He testified that it was the kind of incident that would have been reported to Brock, but the tools

would have been taken to RASP and they would have tried to "work the situation out."[21]

Nor does the removal of the tools from the engineers' shop to the water treatment plant justify adverse action under the circumstances presented here. It is true that Merino directed the engineers to remove hot trash from the shop in preparation for a security audit, and he may not have mentioned the removal of tools specifically. However, according to every engineer who testified, the directive was issued in an agitated state and in broad, ambiguous terms. Clearly, it was reasonable for the engineers to include uninventoried tools within the meaning of the term "hot trash" and remove them to the water treatment plant. The alternative was to leave the tools in the shop for discovery by the security audit personnel. This would have run counter to Merino's order and stated objective to "get everything the fuck out of here and we'll deal with it later," as Morte put it. Given Merino's agitated state, his stated fear that the security audit personnel like to "burn people," his ambiguous order, and the time constraints on the engineers to dispose of hot trash in Merino's absence, transporting the tools to the water treatment plant for temporary storage fell within Merino's directive and does not establish just cause for adverse action. Even Brock, upon learning that the tools had been moved to the

[21]Testimony given by Tofanelli tends to corroborate that given by Plesha and Merino. Although improvements were being made, he said tool control was a matter of ongoing concern to IUOE members and existing procedures were not evenly enforced.

water treatment plant, said the matter would be treated with LOIs.

It is noteworthy that removal of the tools in no way jeopardized security of the tools or the facility. The tools were taken to the water treatment plant outside the fenced perimeter and secured in a locker with Cates's lock.

The allegation that Plesha attempted to conceal the tools from supervisory staff is weak.[22] The tools were moved to the water treatment plant at Merino's direction, they were placed in a locker where Merino regularly worked, and they were secured with a lock to which Merino and others had a master key. Thus, the likelihood that Merino would run across the tools was not remote. In fact, the engineers convincingly testified that attempts were made to contact Merino on April 24, 25 and 28. When these attempts failed, they brought the matter to Brock's attention within three work days and indicated their displeasure that the supervisors had not contacted them at the outset. This is not the kind of evidence that suggests an attempt to conceal tools.

In addition, the allegation that Plesha was dishonest when he told investigators on September 22 that he discovered the saws

[22] Although Plesha was not charged with theft in the letter of reprimand, that allegation was a key reason for the investigation in the first place. However, the early suggestion of possible theft based on the assumption that the tools were being "staged" to be stolen later is suspect. As Tofanelli testified, if Brock and others truly thought the engineers were trying to steal tools, it seems likely that they would have placed the water treatment plant under surveillance rather than remove the tools to another location.

in the engineers' shop a few days prior to April 24 is not established in the record. As I have found in the findings of fact, it has not been shown that Ruiz personally delivered the saws to Plesha in the engineer shop. Thus, the State has not met its burden of showing that Plesha's answers during the investigative interview were dishonest.

Nor has the State established that Plesha was dishonest in claiming the circular saw was not suitable for use in the engineer shop so he offered it to Brewer for use in the carpenter shop. The transcript of the September 22 investigatory interview indicates that Plesha made the statements attributed to him regarding his discussion with Brewer. Brewer testified in this proceeding and the SPB proceeding. On both occasions he did not deny that Plesha had discussed the saw with him. In both hearings, Brewer testified that he did not recall talking to Plesha about the saws, but it's possible that he did. Once again, this is hardly the kind of evidence that supports disciplinary action for dishonesty.

The allegation that Plesha was dishonest during the investigatory interview about the threat to Brock has been addressed above. Suffice it to say at this point that the State has not established Plesha was dishonest in his answers on this issue.

Based on the foregoing, it is concluded that the State has not established that it had just cause to discipline Plesha. The

allegations advanced to support the letter of reprimand are found to be pretextual.

REMEDY

The Board, in section 3514.5(c), is given

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that CDC retaliated against Plesha for engaging in protected activities as a Union steward by investigating him for the April 24 tool incident and subsequently issuing him a letter of reprimand. By this conduct, CDC has interfered with his right to engage in protected conduct, in violation of section 3519(a). By the same conduct, CDC has interfered with IUOE's right to represent bargaining unit employees, in violation of section 3519(b). It is appropriate

to order CDC to cease and desist from such conduct and to withdraw the letter of reprimand and destroy all references thereto. (See Marin Community College District (1980) PERB Decision No. 145, p. 20.)

With regard to the lost promotion, IUOE argues that Plesha should be placed either in the chief engineer position at Corcoran which he was denied or in the first available chief engineer position in northern California. It would not effectuate the purpose of the Act to invalidate the promotion of the person who currently fills the chief engineer job at Corcoran

and place Plesha in that position. (See State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S, pp. 18-19.) It would effectuate the purpose of the Act to adopt a remedy that restores Plesha to the situation he would be in but for the unlawful conduct. In this case, such a remedy requires placing Plesha in a position that is acceptable to him, as was the position at Corcoran. It is appropriate, therefore, to order that Plesha be offered the next available chief engineer position in northern California. To the extent possible, such a remedy restores Plesha to the position he would be in but for the unlawful conduct. (See Santa Clara Unified School District (1979) PERB Decision No. 104, p. 26.)

It is also appropriate that CDC make Plesha whole for losses, monetary and otherwise, incurred as a result of its unlawful conduct. (See Regents of the University of California (1997) PERB Decision No. 1188-H, pp. 33-35.) Reimbursement for monetary losses shall be at the interest rate of 7 percent per annum. (Ibid.)

Finally, it is appropriate that CDC be required to post a notice incorporating the terms of the Order. The Notice should be subscribed by an authorized agent of CDC, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size and reasonable effort will be taken to insure that it is not altered, covered by any material or defaced and will be replaced if necessary. Posting such a notice will inform employees that CDC has acted in an unlawful manner and is being

required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce CDC's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; see Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Ralph C. Dills Act (Act), Government Code section 3514.5(c), it is hereby ordered that the State of California (Department of Corrections) (CDC) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Remove the letter of reprimand from the personnel file of Steven Plesha and destroy all references thereto.

2. Offer Steven Plesha the next available chief engineer position in northern California.

3. Reimburse Steven Plesha for losses, monetary and otherwise, incurred as a result of CDC's unlawful conduct, at the interest rate of 7 percent per annum.

4. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices

to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CDC indicating that CDC will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

5. Upon issuance of a final decision in this matter, notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

_____

FRED D'ORAZIO
Administrative Law Judge